IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 26 OF 1998.

1. Shri Shanta Shivram
   Komarpant and his wife
2. Smt. Suvidha Shanta
   Komarpant.
3. Shri Ravi Shivram
   Komarpant and his wife
4. Smt. Suvarna Ravi
   Komarpant,
   all r/o Nagarcem,
   Canacona, Goa. ... Appellants.

Versus

1. Shri Naguesh Shivram
   Komarpant and his wife
2. Smt. Sushma Naguesh
   Komarpant,
   both r/o Nagarcem,
   Canacona, Goa. ... Respondents.

Mr. Sudesh Usgaonkar, Advocate for the Appellants.

Mr. Shivan Dessai, Advocate for the Respondents.

Coram : P.V. HARDAS, J.

Date : 13th April 2004.

ORAL JUDGMENT.

This Second Appeal, at the instance of original defendants, was admitted, by this Court on 26th November 1998, on the following substantial questions of law:-

> "1. When the purchaser wants to enforce rights on the basis of Deed of Sale between seller and purchaser against third party wherein the land conveyed cannot be identified either because discrepancy in the area-statement, nature of land, boundaries of the property, can the correct extent of land and its identification be proved by purchaser without examining the seller or

witness to the transaction?

2. When it is admitted that description of the property given in the Deed of Sale differs from property claimed to be conveyed, can such documents be relied in the evidence without first rectifying the discrepancies either as provided in Section 26 of Specific Relief Act or by Rectification Deed?

3. Could oral evidence be given to prove the terms of the written contract being deed of sale dated 5/2/74 in contradiction and in variance with term of such contract?"

2. During the course of hearing, the learned counsel for the appellants has submitted that in this Second Appeal the following substantial questions of law also arise and are required to be dealt with. The said substantial questions of law are:-

"1. Whether the principle that where there is conflict between area statement and the boundaries, the description by the fixed boundaries and the area contained within that will prevail over the area statement, was at all attracted in the facts of the present case as held by the Appellate Court?

2. Whether relief of injunction could be granted on the basis of exclusive possessory title by the plaintiff when the joint enjoyment and possession with defendants was admitted by the plaintiff till two years prior to filing of the suit?"

3. In order to appreciate and evaluate the submissions of the learned counsel of the parties in respect of the substantial questions of law, it is

necessary to refer to the facts of the present Second Appeal.

4. The respondents/plaintiffs filed Regular Civil Suit No. 42 of 1991 in the Court of the Civil Judge, Junior Division, Canacona, praying therein for a decree declaring that the plaintiffs are the sole owners and are in peaceful enjoyment and possession of the suit property. The plaintiffs also prayed for perpetual injunction restraining the defendants, their agents, family members, friends, representatives, attorneys, servants, etc., from interfering and/or trespassing in the suit property and thereby doing illegal acts in it. The plaintiffs also prayed for an Order directing the Mamlatdar of Canacona and Talathi of Chawdi Village to delete the name of Radha Shivram Komarpant from the occupant's column of the Survey Records relating to Survey No. 98/12 of the Village Chawdi and to insert the names of the plaintiffs.

5. In the plaint it was averred that the plaintiffs are the owners and in peaceful possession of 1/8th of the landed property known as 'Kasarbag' or 'Cancara Baga', situated at Canacona, having an area of 600 square metres, enrolled in Taluka Revenue Office under No. 1253 and surveyed under Survey No. 98/12. The plaintiffs also gave the boundaries of the suit

land. It was averred by the plaintiffs that plaintiff no. 1 had purchased the suit land by a Sale Deed, dated 5th February 1974 from one Smt. Ramabai Narayan Desai, which was registered in the Office of the Sub-Registrar, Canacona, on 8th February 1974. The plaintiffs further averred that the plaintiff no. 1 had purchased the same from out of his earnings and had planted coconut saplings, etc.. The plaintiffs further averred that the suit property is recorded in the occupant's column in the name of his late mother Radha Shivram Komarpant, while conducting the survey in 1975, as the plaintiffs were then residing at Panjim on account of employment. The plaintiffs also averred that the plaintiff no. 1 had moved an application before the Deputy Collector, Quepem, on 4th January 1999, for deletion of the name of his mother from the Survey Records, but, the same came to be rejected by the Deputy Collector for want of jurisdiction. It was then averred by the plaintiffs that the defendants 1 and 3, on various occasions, tried to interfere and encroach on the suit property. The plaintiffs had complained to the Canacona Police Station on various dates. The plaintiffs alleged that on 6th October 1991, at 11.00 a.m., when the plaintiff no. 1 had gone to the suit property along with his daughter, the defendant no. 3 was heard to say that he (defendant no. 3) along with the other defendants would not allow the plaintiffs to interfere and enjoy the suit property

at any costs and 'shall dispossess them'. The plaintiffs, accordingly, filed a suit and prayed for the reliefs stated above.

6. The defendants/appellants, on notice, filed their written statement, at Exhibit 7. The defendants denied that the plaintiffs are in peaceful possession of the suit property. The defendants also contended that the suit property originally belonged to the parents of plaintiff no. 1 and defendants 1 and 3. Their parents had constructed a cowshed and W.C. in the suit land. The defendants also contended that their parents had planted coconut trees and other trees. The defendants deny that the suit property was surveyed under No. 98/12 and that it was enrolled in the Taluka Revenue Office under No. 1253. The defendants also denied the boundaries of the suit property as stated by the plaintiffs. In fact, the defendants took a categorical stand that the suit property, which was purchased by the plaintiff no. 1, by Sale Deed, dated 5th February 1974, did not pertain to the suit property. The defendants also alleged that it was the plaintiffs who were trying to dispossess the defendants and claimed to be in possession of the suit property.

7. On the basis of the rival pleadings, the learned trial Court, on 13th January 1992, framed the

following issues-

> "1. Whether the plaintiffs prove that they are owners in possession of the property described in para 2 of the plaint?
>
> 2. Whether the plaintiffs prove that plaintiff no. 1 had purchased the suit property by sale deed dated 5/2/1974 by spending his own money?
>
> 3. Whether the plaintiffs prove that name of mother of plaintiff no. 1 has wrongly been recorded in the survey records?
>
> 4. Whether the plaintiffs prove that they are entitled for the relief claimed by them?
>
> 5. Whether the defendants prove that they are using W.C. and cowshed and also enjoying fruits of coconut trees situated in the suit property?
>
> 6. What relief? What order?"

The learned trial Court framed additional issues, on 18th November 1994, which are reproduced hereunder:-

> "7. Whether the defendants prove that the suit of the plaintiffs is bad for non-joinder of necessary parties?
>
> 8. Whether the defendants prove that the suit of the plaintiff is under valued?
>
> 9. Whether the defendants prove that the suit property was divided among the plaintiffs and the defendants into three equal parts?
>
> 10. Whether the defendants prove that they have claimed the title and ownership by way of prescription and adverse possession?"

On the basis of the issues framed by the trial Court, the parties went to trial and the plaintiff no. 1 examined himself as P.W.1, Sudakar Komarpant as P.W.2, Zavlo Matenkar as P.W.3, Kalpana Komarpant as P.W.4 and Shabu Vagonkar as P.W.5. The defendants examined Gopi Komarpant as D.W.1, Nilkant B. Naik Gaonkar as D.W.2, Shrirang Raikar as D.W.3 and Sharad Bhagat as D.W.4.

8. The learned trial Court, on appreciation of the evidence, recorded a finding in the affirmative in respect of issues 1, 2 and 3. It recorded a finding partly in the affirmative in respect of issue no. 4. In respect of issues 5, 8, 9 and 10, the learned trial Court had recorded a finding that these issues had not been proved. In respect of the additional issue no. 4, the learned trial Court recorded a finding in the affirmative. The learned trial Court, by its Judgment and Decree, dated 30th March 1995, partly decreed the suit by granting prayer clause in respect of perpetual injunction and restrained the defendants etc., from interfering and trespassing in the suit property. In respect of prayer clauses (C) and (D), that is, in respect of a decree for declaration and for issuance of direction for deletion of the name of Radha Shivram Komarpant, the learned trial Court rejected it. On appeal being carried by the original defendants to the appellate Court, the learned Additional District Judge

(II), by Judgment and Decree, dated 12th June 1998, dismissed Regular Civil Appeal No. 24 of 1995, thus, confirming the Judgment and Decree passed by the learned trial Court. The original defendants/appellants have, therefore, filed the present appeal.

9. The first substantial question of law, on which the appeal has been admitted, relates to the identification of the property by the purchaser without examining the seller or the witnesses to the transaction, in the event there is discrepancy in respect of the area statement. In order to appreciate the submission of the learned counsel for the parties, it needs to be stated that the plaintiff no. 1 had produced on record the Sale Deed, that is, his document of title, at Exhibit P.W.1/A. The Sale Deed, at Exhibit P.W.1/A contains a statement that 1/8th part of the property is being sold to the plaintiffs for a consideration of Rs. 350/-. The Sale Deed also states that area purchased by the plaintiff no. 1 is admeasuring 30 x 55.5 metres. Thus the area purchased by the plaintiffs under the Sale Deed works out to 1653 square metres. The Sale Deed also states the boundaries of the land sold under the Sale Deed. It is stated that the land sold under the Sale Deed is bounded on the East by Cancarabaga of Panduranga Suriaji Sinai Nagorcencar and others, on the West property of Shri Datatraia Zulpo

Naik Bhagat, on the North property of Suresh Loximona Nagorcencar and others and on the South property of Ananda Narahari Sinai Nagorcencar and others. In the plaint also, at paragraph 8, the boundaries as stated in the Sale Deed at Exhibit P.W.1/A are reproduced. The defendants in their written statement have denied the boundaries as stated by the plaintiffs. The statement of the plaintiffs that the suit land is surveyed under Survey No. 98/12 is also denied by the defendants in their written statement.

10. The plaintiff no. 1 in his evidence has also narrated the same boundaries as are stated in the Sale Deed and in the plaint. The plaintiff no. 1 has also stated that the suit land is surveyed under Survey No. 98/12. In the cross-examination he has denied the suggestion that the boundaries stated by him were not in respect of the land at Survey No. 98/12. He also denied the suggestion that the suit property was not exclusively possessed by him but the same was jointly possessed by the defendants also. He also denied the suggestion that the property surveyed under Survey No. 98/12 and the suit land were different properties. Apart from this, there is no other effective cross-examination on this aspect. The defendants examined Gopi Komarpant as D.W.1. D.W.1 Gopi is the Power of Attorney of the defendants. According to him,

the plaintiff no. 1 and defendant nos. 1 and 3 are brothers and sons of late Shivram Komarpant. He states that the father of plaintiff no. 1 and defendants 1 and 3 expired in the year 1975. The name of the wife of Shivram Komarpant was Radha Shivram Komarpant, who was the mother of plaintiff no. 1 and defendants 1 and 3. He further states that in the ancestral house he and his brother Shivram Komarpant were staying separately after effecting partition amongst themselves. The land on which the ancestral house exists belonged to one Sharad Bhagat of Canacona. He further states that adjacent to their ancestral house is a property known as 'Kasarbag'. According to him, the said property known as 'Kasarbag' belongs to one Jaganath Sinai Nagarcenkar and a portion of the property ''Kasarbag' was in the possession of his brother Shivram Komarpant while the other portion of 'Kasarbag', which was held by the cousin of Jaganath, was in his possession (D.W.1). He further states about the portion of the property 'Kasarbag' being in the possession of Shivram Komarpant and Shivram Komarpant cultivating the property and planting coconut saplings etc.. In the cross-examination D.W.1 Gopi has admitted that Jaganath Sinai Nagarcenkar expired about 30 to 35 years ago and he had a daughter by name Ramabai. He further admitted in the cross-examination that the portion of the property 'Kasarbag' in possession of Shivram Komarpant was admeasuring 600 square metres. He

has also stated the boundaries of the suit portion by stating that on the East the property was bounded by the property of Pandu Sinai Nagarcenkar, on the West by property of Datta Bhagat, on the North by the property of Vasant Nagarcenkar and on the South by the property of Shankar Nagarcenkar.

11. The learned appellate Court, on the basis of the evidence which has been reproduced above, recorded a finding that the boundaries of Survey No. 98/12 tally with the boundaries of the land mentioned in the Sale Deed and, therefore, it could be safely inferred that the property purchased by the Sale Deed is the same property which is surveyed under Survey No. 98/12. Similarly, the appellate Court, relying on the admission of D.W.1 Gopi that the property under Survey No. 98/12 originally belonged to one Jaganath Sinia Nagarcenkar and that Jaganath Sinai Nagarcenkar had a daughter by name Ramabai, came to the conclusion that this admission was sufficient to prove that the vendor Smt. Ramabai Nagarcenkar was the owner in possession of the suit property under Survey No. 98/12. The appellate Court then, in view of the discrepancy in the area statement qua the recital in the Sale Deed, the pleadings and the evidence of the plaintiffs, recorded a finding that in view of the boundaries of the two properties tallying, it was 'manifestly evident that the property purchased

by the plaintiff corresponds to Survey No. 98/12." The learned appellate Court also negatived the plea of adverse possession set up by the defendants.

12. The defendants' case was that the property purchased by plaintiff no. 1, by Sale Deed, at Exhibit P.W.1/A, was different and was not the same property which was surveyed under Survey No. 98/12. The defendants had also disputed the boundaries as stated by the plaintiffs. However, neither D.W.1 Gopi nor any other witness had led any evidence in respect of the boundaries to substantiate the case set up by them in their written statement. The appellate Court, relying on the evidence of the parties and on appreciating the same, recorded a finding that the boundaries in respect of the suit land tallied with the boundaries of the land surveyed under Survey No. 98/12 and, therefore, they were one and the same land. The plaintiffs had admittedly proved their title by production of the title deed and a mere discrepancy in respect of the area in the area statement would not vitiate the Sale Deed nor the statement. Therefore, according to me, these findings of fact, as stated above, cannot be re-agitated by way of substantial question of law at serial No. 1. According to me, the substantial question of law at serial No. 1 does not arise for consideration as the property has been properly identified on the basis of

the boundaries and there is no challenge to the boundaries on behalf of the defendants. The defendants have also not led any evidence to dispute the boundaries stated by the plaintiffs.

13. Turning to substantial question of law at serial No. 2, it is urged by Mr. Usgaonkar, the learned counsel appearing on behalf of the appellants, that, admittedly, the Sale Deed, at Exhibit P.W.1/A, stated that the land sold to the plaintiff no. 1 under the Sale Deed was admeasuring about 1,665 square metres. The plaintiff no. 1 had stated in his pleading as well as in his evidence that he had purchased land admeasuring 600 square metres. Therefore, according to Mr. Usgaonkar, unless and until the defect in the area statement was rectified as provided under Section 26 of the Specific Relief Act, the Sale Deed, at Exhibit P.W.1/A, was inadmissible in evidence and consequently the plaintiffs could not lead oral evidence to contradict the written terms of the Sale Deed.

14. The learned appellate Court in paragraph 18 of the Judgment has held that no doubt there was some discrepancy in the area of the property as mentioned in the Sale Deed and the actual area of Survey No. 98/12. However, the said discrepancy would not affect the validity of the Sale Deed, particularly so, when the

property which was sold was clearly identified by giving the boundaries and the matriz numbers. In that background, therefore, the learned appellate Court came to the conclusion that as there was discrepancy in the area statement, the identification on the basis of the boundaries would prevail. In the present case no doubt the area statement in the pleadings and the evidence materially differs with the area statement as recited in the Sale Deed, at Exhibit P.W.1/A. However, nothing turns on this area statement as the plaintiff no. 1 has given the boundaries in his plaint as well as he has stated about the boundaries in his evidence. The said boundaries tally with the boundaries as described in the Sale Deed, at Exhibit P.W.1/A. There is absolutely no evidence led by the defendants contradicting the statement of the plaintiffs in respect of the boundaries. Though the plaintiffs have, therefore, led evidence to show that what was purchased by them was admeasuring 600 square metres and this statement is found to be factually incorrect in view of the recital in the Sale Deed, the Sale Deed would not be rendered inadmissible merely on account of the fact that the plaintiff no. 1 has neither pleaded for rectification in the plaint nor has he sought rectification under Section 26 of the Specific Relief Act. In a sense, therefore, even if the oral evidence of the plaintiffs in respect of the area statement is left out of

consideration as being inadmissible, the fact remains that the suit property has been duly identified on the basis of the boundaries. A finding in this behalf is recorded by the learned appellate Court that the suit property has been identified by the boundaries as the property surveyed under Survey No. 98/12. Therefore, though the plaintiff no. 1 was not permitted or could not be permitted to lead oral evidence to contradict the written terms of the contract and even if that was left out of evidence, that cannot be a ground for holding that the property was not properly identified as the plaintiffs have been successful in describing the property in the Sale Deed and the area surveyed under Survey No. 98/12 by its boundaries, which tally. This is a finding recorded by the lower appellate Court and the said finding cannot be said to be perverse warranting any interference in Second Appeal.

15. Mr. Usgaonkar, learned counsel for the appellants, has submitted that two other substantial questions of law arise for consideration and which have been reproduced by me above. According to Mr. Usgaonkar, the first substantial question of law would arise only in the event the discrepancy or conflict in the area statement is evident from the contents of the instrument itself and this fact situation is not available in the present appeal. According to Mr.

Usgaonkar, the conflict or discrepancy arises in between the recital in the Sale Deed and the pleadings and evidence of the plaintiffs. The learned appellate Court broadly applying the principle that in the event of discrepancy in the area statement the identification of the property on the basis of the boundaries could be accepted recorded a finding. Therefore, according to me, the substantial question of law framed by Mr. Usgaonkar does not arise for consideration.

16. Mr. Usgaonkar has also urged that there was no evidence that the suit property was exclusively in the possession of the plaintiffs and in that view of the matter the injunction as prayed cannot be granted. In this behalf the learned appellate Court in paragraph 25 has recorded a finding that there is no cogent or conclusive evidence to prove that the parents of the plaintiffs were in possession of the suit property prior to its purchase by the plaintiffs or that the defendants are in possession of the suit property. The said finding has been recorded on the basis of the evidence led by the parties. The said finding is supported by material on record and there is no perversity in the said finding. Therefore, according to me, the second point urged by Mr. Usgaonkar also does not arise for consideration.

17. The two Courts below have recorded findings of fact and with the assistance of the learned counsel for the parties, I have perused the evidence and I do not find any perversity in the reasonings of the two Courts below to warrant any interference in upsetting the same in Second Appeal. The Second Appeal is, thus, devoid of any substantial questions of law and deserves to be dismissed and is, accordingly, dismissed with no order as to costs.

(P.V. HARDAS)
JUDGE.

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